

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 INDECK KEYSTONE ENERGY, : CIVIL DOCKET
4 LLC, :
5 Plaintiff :
6 v. : Case No. 04-CV-00325-SJM
7 VICTORY ENERGY OPERATIONS, :
8 LLC, :
9 Defendant : Motion for Protective Order

10 Hearing in the above-captioned matter
11 held on Friday, July 15, 2005, commencing at
12 1:00 p.m., before the Honorable Sean J. McLaughlin,
13 at the Unites States Courthouse, 17 South Park
14 Row, Erie, PA 16501.

15
16 For the Plaintiff:

17 John K. Gisleson, Esquire
18 Schnader Harrison Segal & Lewis
19 120 Fifth Avenue
Suite 2700, Fifth Avenue Place
Pittsburgh, PA 15222

20 For the Defendant:

21 Christopher T. Sheean, Esquire
22 Kelley Drye & Warren
23 333 W. Wacker Drive, 26th Floor
Chicago, IL 60606

24
25 Reported by Sonya Hoffman
Ferguson & Holdnack Reporting, Inc.

1:00PM THE COURT: Good afternoon. Please be seated.
2 All right. This is the time that we set for argument on the
3 Victory Energy's motion for protective order from discovery
4 as well as the flip side of that coin, the Plaintiff's
1:01PM motion of production in opposition to Defendant's motion for
6 protective order.

7 Before we talk about the merits here, under the
8 group that hope springs eternal, has there been any
9 discussion or progress made in trying to resolve this?

1:01PM MR. GISLESON: No, Your Honor, there hasn't.

11 THE COURT: So much for hope. Who's going to be
12 pulling Victory's oars at this argument?

13 MR. SHEEAN: Good afternoon, Your Honor,
14 Christopher Sheean on behalf of Victory Energy. And I have
1:01PM with me a company representative, Mark White.

16 THE COURT: Do you want to come up to the podium,
17 please.

18 MR. SHEEAN: Your Honor, first of all, thank you
19 for taking the time today to have us in here. It shows the
1:01PM seriousness the Court takes with respect to this issue and
21 we treat it in a similarly serious manner. I know Your
22 Honor has had an opportunity to review the briefs and we
23 spoke about them for a short while 10 days ago, but I wanted
24 to go back over quickly what we're asking for here and why.

1:02PM First of all, we understand the Federal Rules of

1:02PM Civil Procedure allow broad standards for discovery and
2 under Rule 26 it's not only what is relevant, but what could
3 lead to discovery of admissible evidence.

4 THE COURT: Before we talk about the merits of
1:02PM your motion, let me ask you a factual question to see if you
6 either agree or make a factual assertion to this -- to put
7 it better, I'm parroting what the Plaintiff has said and
8 that is: Is it true that vortex steam separators and
9 Chevron steam separators can be placed in any water tube
1:03PM boiler, old style or not?

11 MR. SHEEAN: Well, actually, it's not a yes or no
12 question, Your Honor. First of all, we take great issue
13 with the terminology of old style and new style boiler; that
14 is a term -- not a term of art to the industry, but a loose
1:03PM handle that Indeck Keystone has come up with for this
16 litigation that we don't think is consistent with the terms
17 of the agreement.

18 But I would agree that vortex and Chevron steam
19 separators can be used in different types of water tube
1:03PM boilers, and in limited instances they could be used in
21 other types of boilers, but they're only used in high
22 pressure boiler applications.

23 THE COURT: Now, are vortex steam separators and
24 Chevron steam separators component parts of a broader
1:04PM universe of Keystone technology?

1:04PM MR. SHEEAN: I don't know -- excuse me, I don't
2 know how Your Honor is using the term "Keystone technology"
3 or "broader universe". Victory Energy has sold -- let me
4 see if I can answer the question as I understand it.

1:04PM Victory Energy has sold water tube Keystone
6 boilers with vortex steam separators and Chevron steam
7 separators with the full assistance of Erie Power
8 Technology, the licensure, under the original license
9 agreement. And I see where Your Honor is going if I can
1:04PM address that point a little more fully.

11 THE COURT: Go ahead.

12 MR. SHEEAN: Mr. Poloski makes the assertion that,
13 well, we need to see all of Victory Energy's HRSG sales
14 because they could have --

1:05PM THE COURT: Incorporated Keystone Technology into
16 it, that's the claim.

17 MR. SHEEAN: Right. Right. Such as the vortex
18 steam separator or the Chevron steam separator. The short
19 answer is, Victory has never done that. They never sold an
1:05PM HRSG with the vortex steam separator or a Chevron steam
21 separator. They just haven't, because they haven't sold any
22 high pressure application HRSG boilers.

23 And let me turn the analysis to the way that I'm
24 looking at it so I can share with the Court where we're
1:05PM coming from. Is it possible, maybe, could it be in the

1:05PM realm of all possibility that some component that Victory
2 Energy utilized in Victory -- or in Keystone boilers could
3 have been utilized in another application, yes. But that
4 gives rise to two questions, one, did that happen, and, two,
1:05PM was it a proprietary piece of technology or we talking about
6 utilizing a round wheel on an automobile?

7 Now, the reason why we -- and this is a topic
8 that's near and dear to my client's heart and why they said,
9 yes, why we don't go to Erie and fight about this is because
1:06PM we're not talking about a box of documents here. We're
11 talking about Victory sold 59 HRSG boilers to date, and it's
12 one of their most proprietary items. They have come up with
13 some specific design applications that they have patents
14 on --

1:06PM THE COURT: Excuse me, in a nutshell, without
16 getting overly technical, what is the difference -- and I
17 know you don't like the phrase "old style boiler", so I'll
18 say Keystone boiler, all right; what is the major difference
19 between the HRSG and the Keystone boiler?

1:06PM MR. SHEEAN: To answer Your Honor's question, the
21 major difference is the heat source, in a very broad
22 spectrum of speaking. HRSG stands for Heat Recovery Steam
23 Generator. So, for instance, if you've got an application
24 already in place in your factory where you've got heat
1:07PM exhaust coming off, you want to take advantage of that and

1:07PM utilize that exhaust in a manner that you can generate more
2 steam or energy, okay? So HRSG is the application you would
3 use to do that. Whereas, the Keystone water tube boiler is
4 a direct-fired boiler and I'm going to, just to illustrate,
1:07PM I believe -- Your Honor, if I may approach?

6 THE COURT: Yes.

7 MR. SHEEAN: I am handing up an illustration. On
8 one side you see a Victory Energy HRSG boiler and on the
9 other side you see a Keystone old style boiler.

1:08PM THE COURT: Right.

11 MR. SHEEAN: And looking at them, they appear
12 pretty dissimilar, obviously, but that doesn't necessarily
13 assist the Court in the difference. The HRSG does not have
14 a water drum at the bottom, it has headers where the hot
1:08PM gases pass through and that's how they heat the steam. It
16 utilizes a completely different type of technology to heat
17 the steam. So the technology that's in place for an HRSG is
18 understandably different.

19 Let's get to the heart of this case and what this
1:08PM case is about. Victory Energy signed a license agreement
21 with Erie. They were allowed to utilize the name, Keystone,
22 in selling a certain class of boilers that Your Honor will
23 have to determine what that class was. But they also were
24 given some software, some software to rate the boilers. And
1:09PM by that, I mean, to determine if you've got a boiler that's

1:09PM this long, and this high, with this many rows of tubes
2 (indicating), what can I expect the gas coming out, the
3 exhaust, what's the temperature going to be, how much steam
4 can I make, et cetera, et cetera, you rate the boiler.

1:09PM That's what the software is for, to rate the old style, the
6 Keystone boilers.

7 Victory Energy got that from Erie and they're
8 still using it today to sell Keystone boilers and they're
9 still paying royalties to the licensure under that
1:09PM application. That software cannot be used for HRSG
11 technology, it's a completely different type of technology.
12 You can't take the software that was given to Victory and
13 utilize it for HRSG. You don't measure the output on an
14 HRSG boiler in the same way, it truly is apples and oranges.

1:09PM THE COURT: Do you have any other -- is there any
16 other product which you consider proprietary which you sell
17 besides the Victory style boiler?

18 MR. SHEEAN: Do you mean the HRSG boiler?

19 THE COURT: Yes.

1:10PM MR. SHEEAN: Judge, I think that's a pretty broad
21 question. Is there any other proprietary technology that
22 Victory Energy may have attempted to sell --

23 THE COURT: Do you sell other boilers besides the
24 HRSG boilers?

1:10PM MR. SHEEAN: In the Keystone boiler?

1:10PM THE COURT: Yes.

2 MR. SHEEAN: Well, Victory Energy is an authorized
3 distributor of fire tube boilers, as well. And if I can
4 consult with Mr. White, which is precisely why I brought
1:11PM him --

6 THE COURT: Sure.

7 MR. SHEEAN: I can get a more complete list.

8 THE COURT: Yes.

9 MR. SHEEAN: Besides the standard fire tube
1:11PM boilers, which Victory Energy sells, it also sells heat
11 recovery fire tube boilers.

12 THE COURT: Okay.

13 MR. SHEEAN: And what we're talking about there is
14 basically burning garbage, that kind of thing.

1:11PM THE COURT: Now, to kind of focus our discussion a
16 little bit, tell me if I have this right, your motion is
17 really premised, at least based upon my reading, on three
18 separate propositions. One is that any information,
19 documentation, et cetera that they would be requesting,
1:11PM which predates September 8 --

21 MR. SHEEAN: 2004.

22 THE COURT: -- 2004 is irrelevant.

23 MR. SHEEAN: That's correct.

24 THE COURT: And secondly, any information that
1:12PM would predate January 7, '03 would most certainly be

1:12PM irrelevant because that predated the licensure agreement,
2 itself.

3 MR. SHEEAN: That's correct, Your Honor.

4 THE COURT: And thirdly, that in any event the
1:12PM only information, putting aside the time line, that might
6 arguably be relevant is information relative to Keystone
7 boilers, as opposed to any other product of yours; is that
8 right?

9 MR. SHEEAN: That's correct, Your Honor, and it
1:12PM goes to two main reasons why. Sticking with the
11 non-Keystone argument for a minute, because that's where we
12 started, one is the feasibility issue that we talked about,
13 the other one is the reality, Judge. Victory Energy just
14 hasn't done it and they don't have a scintilla of evidence
1:13PM to support that Victory Energy has ever utilized one piece
16 of technology to manufacture any type of non-Keystone
17 boiler. And yet they believe that they should have this
18 discovery on 50 different HRSG boilers in order to ascertain
19 whether or not they can come up with some angle to come
1:13PM after Victory. That's truly how we read this.

21 THE COURT: Let's take each of your positions so
22 that I can make sure I understand you. You essentially say
23 that with respect to anything that may have occurred prior
24 to September 8, 2004, which is the date that Plaintiff
1:13PM purchased the assets, anything that would have occurred

1:14PM prior to that time -- I'm not sure you used the phrase, but
2 essentially you argued that there's no standing with respect
3 to that and could claim no damages with respect to whatever
4 may have occurred before, arguably, even if it was
1:14PM misappropriation.

6 But my question to you is similar to what I asked
7 you on the phone, aren't these ships passing in the night
8 there? They're not trying to necessarily recover damages
9 for a time frame during which they have no interest, they're
1:14PM attempting to uncover evidence of conduct. Isn't that what
11 they're trying to do?

12 MR. SHEEAN: But if the evidence of conduct is not
13 going to lead to discovery because the conduct predates the
14 date that they had standing, then I don't understand why
1:14PM they should be entitled to go after it. You know, I think
16 the asset purchase agreement -- both of them, the one with
17 Erie Power to CMI, and one from CMI to Indeck Keystone make
18 it very clear that one of the excluded assets are the --
19 specifically any type of uncollected debt. And they're
1:15PM talking -- it says specifically, not just those on the
21 books.

22 So if they're talking about claims, chosen action.
23 If they don't have a right to a chosen action that predated
24 9/8/04, it's still over in the bankruptcy court. Why should
1:15PM the conduct that took place surrounding any of the chosen

1:15PM actions be relevant?

2 THE COURT: So to put a finer point on it then, it
3 is the Defendant Victory's position that the only conduct
4 that could arguably be relevant insofar as the Plaintiff's
1:16PM claims are concerned would be the Defendant's conduct, which
5 was postdated September 8, 2004; is that right?

6 MR. SHEEAN: I think that's right, Your Honor.
7 And I would carve out a caveat to that and that would be, I
8 guess, if Your Honor believes that the license agreement,
9 itself, is ambiguous and has to look outside the four
1:16PM corners of the document, the negotiations, things of that
10 nature, conduct of parties --

11 THE COURT: That's a separate issue, though.

12 MR. SHEEAN: It is.

13 THE COURT: That's more of a parole issue as far
14 as the contract is concerned. Now, do I have it insofar as
15 there had been -- we're talking about two different types of
16 subpoenas here. One is the third party's trying to acquire
17 information about your product line, and the other is to
18 give -- insofar as the third parties are concerned, was
1:16PM there an agreement that that time line would be through
19 January '03?

20 MR. SHEEAN: Starting January of '03 going forward
21 and would exclude any HRSG technology. And I think Your
22 Honor remembers we had a telephone conference following a
1:17PM

1:17PM motion that we filed and we indicated that -- you know, with
2 respect to the protective order -- and I raised this issue
3 but I said I think we've worked this out with respect to the
4 third party subpoenas.

1:17PM THE COURT: But now with respect to you, though,
6 the time frame is January -- back to January 2002; is that
7 right?

8 MR. SHEEAN: That's my understanding, yeah.
9 Mr. Gisleson and I have never discussed that, that a
1:17PM separate agreement with respect to the --

11 THE COURT: And I presume that will be correct
12 when I hear from them. But unlike your third party folks,
13 the subpoenas that are directed to you include the HRSG
14 technology; is that right?

1:18PM MR. SHEEAN: I don't want to speak for
16 Mr. Gisleson. I mean, that's the way I interpret -- the
17 requests are certainly in there. And whether or not --

18 THE COURT: Okay. Well, we're not arguing about
19 something when I can ask him. Let me ask you: Is that
1:18PM right?

21 MR. GISLESON: That is correct, Your Honor. We
22 are interested in discovery concerning the water tube
23 boilers, we are not interested in any discovery dealing with
24 the fire tube boilers whether they are the standard water
1:18PM tube boiler or the HRSG. So that is a category of their

1:18PM operation for which we are not interested in pursuing
2 discovery.

3 THE COURT: I don't have the foggiest idea of what
4 you just said to me.

1:18PM MR. SHEEAN: Judge, can I have a minute?

6 THE COURT: Sure. You go do that.

7 MR. GISLESON: There are two different kinds of
8 boilers, there's the water tube boiler and there's the fire
9 tube boiler.

1:18PM THE COURT: Okay.

11 MR. GISLESON: Victory sells both water tubes, as
12 well as fire tubes. The fire tube portion of the business,
13 we don't have an interest in, we're not seeking discovery in
14 that area, and that's what we indicated in our response to
1:19PM the motion.

16 THE COURT: But you do in the water tube.

17 MR. GISLESON: That's correct.

18 THE COURT: And part of the water tube product
19 line is the HRSG; is that right?

1:19PM MR. GISLESON: You can use the water tube boiler
21 in the HRSG application. I mean, they're both boilers, the
22 difference Mr. Sheean indicated is the heat source. With
23 the water tube boilers and the subject of the license
24 agreement, there's an internal heat source and a burner that
1:19PM generates the heat.

1:19PM So with the HRSG, you're still taking your boiler,
2 just like your Keystone boiler, except you're pulling out
3 the burner, the heat source, and you're piping in the
4 external heat source elsewhere.

1:19PM THE COURT: You know what occurred to me -- and
6 I'm going to kind of shift gears in the middle of the game
7 here. Mr. Sheean, what I'm going to do is, and I think we
8 can tee up this argument better, I want to hear from him,
9 and I'm going to let you come up and respond because that
1:20PM may clear some things up without speculating as to what
11 they're actually looking for.

12 MR. SHEEAN: Very good, Your Honor.

13 THE COURT: Okay, fine.

14 MR. GISLESON: May it please the Court, my name is
1:20PM John Gisleson, I'm an attorney with Schnader Harrison. With
16 me today is Bob Williams, my colleague on the case, and Mr.
17 Terry Poloski, who's the chief engineer at Indeck. Mr.
18 Poloski also is an engineer at Erie Power Technologies, the
19 prior -- the original licensure.

1:20PM To address, quickly, the Standing issue, I don't
21 think that is an issue. Standing is simply who owns the
22 technology.

23 THE COURT: Before we even go farther than that,
24 succinctly tell me precisely what the theory of your case is
1:20PM and precisely the nature of the technology that you claim

1:20PM was improperly -- misappropriated.

2 MR. GISLESON: Yes, Your Honor. Our theory of the
3 case is this: January of 2003 there was a license agreement
4 that was entered between Erie Power Technologies and Victory
1:21PM Energy. The license encompassed a specific particular kind
5 of boiler, which was a water tube boiler, a
6 standard-packaged boiler, which is known as the M Series.

7 Packaged boiler simply means they can design,
8 manufacture, assemble it at the factory. At Erie you can
9 put it on a railcar, put it on a barge, send it out to where
1:21PM the customer is located, pick it up as one piece, and put it
10 into wherever it belongs. That's why it's a packaged
11 boiler.

12 During the time that Victory was -- strike that.
13
1:21PM During the time that Erie Power was the licensure and owned
14 the technology, Erie provided a significant amount of
15 information to Victory to assist it in developing the
16 ability to design and manufacture the Keystone M Series
17 standard-packaged boiler.

18 THE COURT: Okay.

19 MR. GISLESON: The M series is a subset of the
20 O-type boiler that Erie Power was selling. Basically, the M
21 Series -- when you say "the old style", it's the less
22 sophisticated kind of boiler. The new style is the more
23 sophisticated kind of boiler with all the bells and whistles
1:22PM

1:22PM and newer technology. Victory said, we believe we can
2 exploit the old technology, Erie said, fine.

3 The information that Erie provided to Victory has
4 applications beyond the M Series standard-packaged boiler,
1:22PM but it was provided to assist Victory in developing that
6 standard M Series, because, as I said, the M Series is a
7 subset of the larger quantity of Keystone boilers.

8 THE COURT: So the M Series is an upgrade to the
9 old style boiler.

1:22PM MR. GISLESON: Well, no. The M series is the old
11 style boiler.

12 THE COURT: The M Series is the old style boiler.

13 MR. GISLESON: Correct.

14 THE COURT: Okay.

1:22PM MR. GISLESON: So basically, you have old style
16 boilers, an active configuration of the tubing.

17 THE COURT: All right.

18 MR. GISLESON: And in those type boilers you have
19 O Series and M Series. The O Series is the more advanced,
1:23PM the M Series is the less advanced, or the old style boilers.
21 With the information that Victory received, it began to
22 design boilers and pursue boilers that were outside the
23 geometry of the boilers that are specified in the licensing
24 agreement.

1:23PM And that Annex one we talked about in the initial

1:23PM scheduling conference, that sets forth the geometry of
2 boiler that's licensed. With the information that Victory
3 received, it started to pursue boilers that were beyond that
4 geometry and they were still selling them as Keystone

1:23PM boilers because they were able to utilize the information
6 received and basically go beyond the kind of boiler that was
7 specified in the license agreement.

8 So the first aspect of the claim is they were
9 selling boilers -- or trying to sell boilers that were not
1:23PM within the specific confines of the license agreement
11 selling those as Keystone boilers.

12 The other aspect is that we believe that --

13 THE COURT: Let me stop you on that first point,
14 the theory is that you supplied them with proprietary
1:24PM information as to how to build this boiler.

16 MR. GISLESON: Correct.

17 THE COURT: They then utilized that information,
18 but they -- but the boilers that they built were somewhat
19 different --

1:24PM MR. GISLESON: Correct.

21 THE COURT: -- than what was within the
22 specifications for the boilers that they were licensed to
23 sell; is that right?

24 MR. GISLESON: Correct.

1:24PM THE COURT: And when you say "different", I

1:24PM presume -- do you mean different in size, different in
2 capacity, different in design, different in what ways?

3 MR. GISLESON: Primarily the features that were
4 included in those boilers -- as I said, the M Series is
1:24PM basically one of the two O-type boilers, the O Series and
6 the M Series. O is more advanced. Erie Power gave certain
7 technical information to Victory that did encompass both the
8 O Series and the M Series boilers. And then they provided
9 that information to assist Victory with specific
1:25PM applications without being confronted so they could learn
11 from other boilers that Erie Power had designed,
12 manufactured, and sold.

13 So that while they're still selling what appeared
14 to be an M Series boiler, just based on the basic
1:25PM configuration, they included elements from the O Series that
16 was beyond the scope of the license agreement so that they
17 still took proprietary Erie information that was provided to
18 them to assist them in understanding how to design and
19 manufacture the M Series.

1:25PM THE COURT: It sounds like you gave them too much
21 information.

22 MR. GISLESON: Yes and no. I mean, yes, it sounds
23 like that, but, no, we didn't. And the reason is this --

24 THE COURT: Aren't you complaining a little? I
1:25PM mean -- go ahead.

1:25PM MR. GISLESON: The reason is this: There was a
2 confidentiality provision in the license agreement that said
3 all the information we give you, the technical information,
4 is proprietary and you agree to keep it confidential. What
1:26PM that did was it facilitated Victory's ability to learn about
6 the technology as well as for Erie Power to be candid with
7 Victory and to assist them. Because keeping in mind, this
8 is an older technology, Erie had been focusing on the O
9 Series, which is the more advanced technology, so that the
1:26PM more recent boilers that Erie Power had been developing were
11 those under the O Series, the new style, which is more
12 advanced.

13 THE COURT: All right. So to put a cap on it,
14 what you did is you gave them proprietary information, some
1:26PM of which was quite specific to the boiler that they were
16 supposed to be building, some of which was proprietary
17 information that really was not specific to the boiler that
18 they were supposed to building, but was given to them anyway
19 to assist them by way of comparison or otherwise in
1:27PM producing the boiler that they were supposed to be
21 producing; is that right?

22 MR. GISLESON: That's correct.

23 THE COURT: And what you say they did is they
24 incorporated into the boiler that they were supposed to be
1:27PM producing proprietary information from the boiler that they

1:27PM were not supposed to be producing; is that essentially it?

2 A. Correct.

3 THE COURT: So what came out was what looked like
4 an M-style boiler to the technical eye, but it had bells and
1:27PM whistles that were proprietary to you.

6 MR. GISLESON: Correct.

7 THE COURT: All right. So what's your other
8 claim?

9 MR. GISLESON: And then the other claim is that
1:27PM they've been going out -- and this is from what Indeck is
11 hearing in the market, they're still going out to sell other
12 boilers that apparently contain these bells and whistles
13 that aren't part of the license agreement and either they
14 are or they aren't holding them out to be Keystone boilers.

1:27PM But it sounds as though, from what I can gather
16 from this hearing, they are seeking to include some of the
17 confidential proprietary information they learned from Erie
18 in non-Keystone boilers.

19 So what we're trying to do is get an understanding
1:28PM both as to the historical relationship between Erie and
21 Victory what information they received, what was the
22 technical advice that was given, so we can understand the
23 Keystone boilers they, in fact, have sold. And then to
24 focus also on any other water tube boilers that they sold
1:28PM that were not Keystone boilers.

1:28PM And then as to the HRSG, the focus is solely on
2 the water tube HRSG, not the fire tube HRSG. We want to
3 know whether they took this Keystone technology and applied
4 it to the water tube HRSG, if you will. The focus is

1:28PM actually very simple for the HRSG discovery that we want.
6 And the focus is on the drum internals because there are
7 drums in the HRSG and it's the same kind of drum that you've
8 got in your basic Keystone water tube boiler and the concern
9 is with the proprietary technology with the pure fire
1:29PM separators.

11 THE COURT: What are the unique components of your
12 non-Keystone proprietary product that you are concerned --
13 well, let me ask it this way: Part of your claim is that
14 they have used proprietary information to improve their own
1:29PM product, right?

16 MR. GISLESON: To improve the Keystone product
17 that was licensed to them.

18 THE COURT: Right. Are there specific components
19 of the technology that you think -- well, tell me what had
1:29PM been incorporated. When I ask the question earlier about
21 the vortex steam separators and the Chevron steam
22 separators, is that two examples of what you think they've
23 done that's inappropriate?

24 MR. GISLESON: Those are two examples of how they
1:30PM could have incorporated the Keystone technology into the

1:30PM HRSG. And frankly, the focus as to the HRSG on the drum
2 internals, which is the vortex steam separators, Chevron
3 purifiers, as well as the circulation design from that,
4 which was utilized.

1:30PM THE COURT: So really there's two distinct things.
6 One is improving the HRSG with your technology, that's one
7 thing over here.

8 MR. GISLESON: Correct.

9 THE COURT: And the other one is building a boiler
1:30PM whose specs went beyond their licensure agreement; is that
11 right?

12 MR. GISLESON: Correct. And when you're talking
13 about improvements, there's some improvements they could
14 make to the design that are proper within the scope of the
1:30PM license agreement. But there --

16 THE COURT: Let me ask you this, and I apologize
17 for interrupting you, but I'm trying to get this straight:
18 Just by way of background, in broad brush, how does the
19 license agreement work and what -- and how are you
1:31PM compensated?

21 MR. GISLESON: There are royalty payments up front
22 that they had to make in connection with the exchange of the
23 technical information -- the basic technical information.
24 There were two lump-sum payments they had to make. And then
1:31PM there are certain royalties and a certain commission

1:31PM percentage based on each --

2 THE COURT: Sale.

3 MR. GISLESON: -- yeah, based on each sale of the
4 boilers. And frankly, what was happening back at the time
1:31PM when Erie was a licensor was that Erie was experiencing some
6 financial pressures which eventually led them into
7 bankruptcy.

8 THE COURT: Right.

9 MR. GISLESON: So that Victory would come back to
1:31PM them and say we have an opportunity to bid this kind of
11 boiler. We want to use the M Series, but we want to make
12 certain modifications to it, and those modifications,
13 frankly, were outside of the scope of the license agreement.

14 THE COURT: Right.

1:32PM MR. GISLESON: And on certain instances,
16 situations, Erie, after disclosure by Victory, said fine,
17 you can go ahead and make those modifications even though it
18 takes you outside of the scope of the license agreement.

19 THE COURT: And this may be more of a practical
1:32PM question than a legal question, but if the licensure
21 agreement was such that you got an up-front royalty payment,
22 or a couple of them, and then periodic percentage payments
23 based upon individual sales, what difference did it make to
24 you whether they were selling a Keystone boiler that was an
1:32PM exact replica of what they were licensed to sell or a

1:32PM Keystone boiler that maybe had some, quote, unquote,
2 improvements that wasn't within the four corners of what
3 they're licensed to sell if they were selling the product
4 and you were making money?

1:33PM MR. GISLESON: Well, there's two differences.
6 One, I agree with the Court, as to Erie Power Technologies,
7 it was in a situation where it was experiencing financial
8 difficulty, which frankly was precisely why, on certain
9 defined occasions with prior disclosure by Victory, Erie was
1:33PM willing to say, okay, you can sell this boiler. Erie did
11 not say, go ahead whenever you want at every opportunity and
12 try to market the improvements that Erie Power developed
13 over decades and decades and decades. It was a one-off
14 situation on certain instances.

1:33PM Now, the license and the associated technology
16 that was acquired by Indeck, Indeck now stands in the shoes
17 of Erie Power.

18 THE COURT: Right.

19 MR. GISLESON: There's nothing in the license
1:33PM agreement that says because Erie Power on one or two
21 occasions gave Victory the right to utilize the bells and
22 whistles, the improvements that Erie developed over decades,
23 you can now go out and market whenever you want, however you
24 want, to whomever you want all these improvements that are
1:34PM our primary --

1:34PM THE COURT: So basically what you're saying in the
2 long run -- well, you're saying two things: You're not
3 bound by their, quote, waiver, if you will, and two, that in
4 the long run you're hurt by this because they are competing
1:34PM in the marketplace with a technology that you developed,
6 which is not licensed.

7 MR. GISLESON: That's absolutely correct. In
8 fact, there is no waiver because there's a nonwaiver
9 provision in the license agreement. And that's the concern.
1:34PM And that's precisely why we want to go back in time before
11 the date of the acquisition of the technology to figure out
12 exactly what information they received, exactly what design
13 information they utilized in building different Keystones so
14 that we can show, hey, these improvement that they claim are
1:34PM theirs, they're not, they're ours.

16 THE COURT: But wouldn't this be true -- we're now
17 talking about the relevance of the pre-January '03 time line
18 before any sharing of information; wouldn't it be true that
19 if you truly have proprietary information, which ultimately
1:35PM translates itself from the blueprint into a component part,
21 that your engineer should know it when they see it? In
22 other words, be able to look at it and say, yeah, that's
23 ours.

24 MR. GISLESON: That's true. And that's precisely
1:35PM why we -- was the only provision that Victory sought that

1:35PM hampered our ability to identify our technology. But what
2 we've also heard from Counsel for Victory, as well as the
3 correspondence from Mark White over to Erie Power, is that
4 we have these improvements, we developed these improvements
1:35PM ourselves without any assistance from Erie, we didn't need
6 them.

7 What we want to do is look at that one-year period
8 before license agreement so we can get a snapshot as to what
9 the engineering capabilities were that Victory had at the
1:36PM time. And we know from the affidavit that John Gdanetz
11 (phonetic) submitted that he's carving out and protecting
12 himself by saying, hey, we didn't have any pre-existing
13 engineering capabilities.

14 What Indeck doesn't want to be met with in
1:36PM discovery or at trial is some claim that, hey, we already
16 knew how to do this even before the license agreement was
17 executed and let me show you how, and they pull out a
18 document from 2002 --

19 THE COURT: In other words, it would really go to
1:36PM the question as to whether or not -- it really implicates
21 the issue as to whether or not the information was truly
22 proprietary.

23 MR. GISLESON: Right. Or was it already in the
24 possession of Victory because there is a carve out for
1:36PM confidentiality or proprietary information in the license

1:36PM agreement that says, if you already knew --

2 THE COURT: It can't be ours, it's not
3 confidential.

4 MR. GISLESON: Yeah. If you already knew this
1:36PM information, then, Erie, you can't consider that to be
6 proprietary because it was already known to me from another
7 source.

8 THE COURT: Let me stop you right there -- you can
9 stay right there, but it's useful for me to swing back and
1:37PM forth. I think that's potentially an important point.

11 If this case is still around and we're at trial
12 someday, would part of Victory's position here be insofar as
13 the confidentiality -- the trade secret, confidential
14 information, proprietary information is concerned that we
1:37PM didn't learn anything from you that we didn't already know
16 before we ever entered into a licensing agreement; is that
17 your position today? Are you following the question?

18 MR. SHEEAN: I think I do, Your Honor. And I
19 think the answer is, first of all, one piece of information
1:37PM that was in the affidavit, Victory Energy didn't manufacture
21 any water tube boilers before it entered into the licensing
22 agreement. It sold two water tube boilers, Erie Power water
23 tube boilers, before January of 2003 because these companies
24 had a pre-existing relationship and, of course, could have
1:38PM taken those boilers apart and gotten confidential

1:38PM information from those.

2 But my point is, as far as the water tube
3 technology goes, this may be a red herring because they
4 weren't selling them anyway. The reason why we're

1:38PM protecting it is because it goes to the HRSG, it has nothing
6 to do with the Keystones.

7 THE COURT: But to answer my question, because
8 it's an important one, is it your position that among the
9 reasons -- among the reasons that the Plaintiff's claim

1:38PM fails is that the information or the technology or the
11 expertise that they are accusing you of having stolen, if
12 you will, from them was already within your domain and you
13 already knew how to do it?

14 MR. SHEEAN: Judge, the answer is no. And the
1:39PM reason why is, it was in the public domain. It was in the
16 public domain. And the reason why it was in the public
17 domain is these kind of boilers have been manufactured for
18 years. What we got from -- and I'll repeat myself, what we
19 got from Erie Power was the use of the name Keystone, which
1:39PM had a lot of cache in the marketplace, and the use of the
21 software program so that we could rate these boilers.

22 Victory Energy did not have the capability in
23 2003, 2004 to write their own rating program. They didn't
24 have the engineering capability, it needed Erie's help. And
1:39PM with respect to certain jobs that Mr. Gisleson has

1:39PM referenced, there are instances where they were back and
2 forth, the Dallas/Fort Worth job, there were jobs where they
3 went back and forth on engineering to make modifications, to
4 make a given boiler taller and wider, or whatever.

1:39PM But this case boils down to two things, Judge,
6 about the quote, unquote, modifications, improvements,
7 whatever. You asked Mr. Gisleson on two different occasions
8 what specific technology do you believe that Victory has
9 misappropriated, and I think he's dodged the issue in both

1:40PM instances. But with respect to the Keystone boilers,
11 there's two specific claims that were made in a letter we
12 just got when the motion was filed, we received it from Bob
13 Gadanich back in March of 2004, he was working for Erie
14 Power; and those are, you're utilizing water-cooled front
1:40PM and rear as opposed to refractory.

16 What that means is you're running cool water
17 around the boiler in the front and back instead of letting
18 it get hot, and you're using membrane tube instead of
19 tangent tube technology. What that means is you're welding
1:40PM those tubes together that are in that drawing so that heat
21 can't escape outside to maximize the efficiency of the
22 boiler and you also reduce the noxious emissions that might
23 go outside.

24 Those modifications, improvements, whatever have
1:41PM been utilized in the industry by Nebraska boiler and many

1:41PM other competitors. So if this case comes down to as to
2 whether or not Victory Energy stole water-cooled front and
3 rear design or membrane wall design, then let's have a
4 hearing on that right now and we can --

1:41PM THE COURT: Well, we're not going to do that right
6 now, but we're just going to try one more time back here;
7 it's still not clear to me, and I think the problem is mine,
8 it's not yours, did you have the technology to do prior to
9 January 7, '03 what you were able to do after January 7,
1:41PM '03?

11 MR. SHEEAN: And by that you mean, build Keystone
12 boilers? No.

13 THE COURT: Then it sounds to me like he has
14 forsworn the argument that they knew how to do it anyways.

1:42PM MR. GISLESON: It sounds like it, and part of the
16 concern also, he said that there were two water tube
17 boilers, actually Erie boilers, that they sold before the
18 license agreement, and it's troubling that there's a refusal
19 even to turn over that documentation to us because if those
1:42PM are the only two water tube boilers that they sold as part
21 of the license agreement and they were sold by Erie Power,
22 the predecessor, then even if those weren't designed or
23 manufactured by Victory to the extent they obtained any
24 detailed drawing for those boilers or otherwise, that's
1:42PM information that they had in their possession.

1:42PM THE COURT: Now, I think I have an affidavit from
2 somebody from that side that -- don't you say -- or your
3 client says, Mr. Sheean, and that Victory has never
4 incorporated into their HRSG product any proprietary
1:43PM information from the Plaintiff?

6 MR. SHEEAN: That's correct, Your Honor. That's
7 Paragraph 4 of it. "VEO is not designed --"

8 THE COURT: Whoa, slow down for her.

9 MR. SHEEAN: "VEO has not designed, manufactured,
1:43PM or sold any heat-recovered steam-generated boilers that
11 incorporate or utilize any EPTI technology in any way."

12 THE COURT: Now, that's by way of affidavit,
13 right?

14 MR. SHEEAN: Yes, Your Honor.

1:43PM THE COURT: And you want to peek in the cupboard
16 to make sure that what he's saying it true, right?

17 MR. GISLESON: Well, that's correct. I can focus
18 the discover more narrowly if the Court wants, but the
19 Court's aware the defense always denies -- or at least they
1:44PM deny and then get into the discovery and you find out that
21 the assertions set forth in the answer weren't exactly
22 accurate.

23 THE COURT: What evidence do you have now as you
24 stand here which supports your suspicion that Victory is
1:44PM improving its HRSG product at your expense?

1:44PM MR. GISLESON: None, other than the fact that they
2 have the ability to do so based on the information they have
3 and our prior knowledge -- or knowledge now, rather, that
4 they, in fact, went beyond the licensing agreement and did
1:44PM not narrowly -- or did not constrain themselves to comply
6 strictly with the licensing agreement.

7 THE COURT: And with respect to that matter, not
8 constraining themselves, do I take it that your suspicion of
9 that is more than a suspicion in your view, it is based upon
1:45PM having seen quote, Keystone boilers that they, in fact,
11 manufactured but which have all the additional bells and
12 whistles?

13 MR. GISLESON: Correct.

14 THE COURT: You've seen them out in the
1:45PM marketplace?

16 MR. GISLESON: I've seen them from the
17 documentation that we received from Erie that indicates that
18 Victory was selling Keystone boilers that were outside the
19 scope of the licensing agreement and that was unknown to
1:45PM Erie at the time those boilers were designed.

21 THE COURT: And notwithstanding the fact that Erie
22 apparently, either because of financial problems or
23 otherwise, aided them in doing some additional tinkering
24 with it, are you saying that this is something beyond that
1:45PM that even Erie is not aware of?

1:45PM MR. GISLESON: For certain of the boilers, that's
2 correct. And then what happened was -- and there's a
3 letter, the Gadanich letter is an attachment to our motion.

4 In the Gadanich letter, Mr. Gadanich, who's an
1:46PM engineer with Erie, was identifying specific concerns that
6 Erie had at the time with respect to Victory's activities in
7 the market, and now Victory was not disclosing to Erie that
8 they were doing certain things that were not on the
9 licensing agreement.

1:46PM At that time Erie and Victory were in discussions
11 that would have Victory acquiring this technology even
12 though they are now saying everything was out in the
13 marketplace. That Victory wanted to acquire all of this
14 technology, instead of simply license it, and the hope was
1:46PM that the parties could reach a resolution that would avoid
16 the need for a conflict over Victory's activities, Erie
17 eventually goes bankrupt, and then we end up now with Indeck
18 as the licensor.

19 So, I mean -- I'll be candid about this, do we
1:46PM have any specific facts showing that they incorporated
21 technology into the HRSG, no, we don't. But the concern is
22 we know that they've gone beyond the licensing before, and
23 they can do it with the HRSG. As to the discovery we want,
24 I don't care about pricing information, I don't care about
1:47PM margin information; as to the HRSG, we would like to get the

1:47PM assembly drawing for the drum internals, which is where the
2 separators and the purifiers are.

3 We also know that they could have used the
4 circulation design program that Erie provided because that
1:47PM circulation design program for the Keystone boilers could be
6 used in the HRSG. So if they want to limit it to the drum
7 assembly drawn for HRSG, that's fine, and carve out the rest
8 of it, I'm happy to accept that.

9 THE COURT: You would settle for only a portion of
1:47PM the blueprint of the HRSG relevant to that portion of the
11 HRSG -- the only portion of the HRSG where you think your
12 technology could be incorporated.

13 MR. GISLESON: Correct.

14 THE COURT: And what, again?

1:47PM MR. GISLESON: It's the drum internal, the drum
16 where the purifiers and separators are located. It's the
17 drum assembly. Your Honor, may I approach?

18 THE COURT: What am I looking at?

19 MR. GISLESON: This is a cutaway of the drum
1:49PM that's on the boiler. And it's basically the same drum that
21 you would find both in an M Series boiler such as this,
22 which goes right along the top, as well as in the HRSG.
23 This is another picture of the HRSG.

24 THE COURT: Hang on one second.

1:49PM MR. GISLESON: Sure.

1:49PM THE COURT: All right.

2 MR. GISLESON: The HRSGs can have different
3 designs. To give you an example, here's the HRSG, here's
4 the M Series, if you look at the basic shape, it's the same,
1:49PM you can see the drum at the top of each boiler.

6 THE COURT: Yes.

7 MR. GISLESON: What we're interested in is the
8 drum assembly drawing that would identify the specific
9 components within the drum. And, obviously, once you get
1:49PM the drum assembly information, it would be easy to determine
11 whether it contains any vortex steam separators or Chevron
12 purifiers.

13 THE COURT: So as I said in the beginning, it
14 really is the vortex steam separators and Chevron purifiers
1:50PM that you're looking for; isn't it?

16 MR. GISLESON: Correct, unless there's something
17 else in there. But those are two best examples that we have
18 of technology that could be imported into the HRSG.

19 THE COURT: Yes, sir.

1:50PM MR. WILLIAMS: Your Honor, the software that was
21 given to Victory by Erie Power, this rating software that
22 we're talking about, it contains a component that allows
23 them to make sure that the water -- to design the water
24 circulation characteristics, and that software can be used
1:50PM in any boiler, any water tube HRSG. So that's also a

1:50PM component piece of technology that could have been used to
2 design these HRSGs that we're talking about. So it's the
3 purifiers, plus the circulation technology.

4 THE COURT: Let me ask Mr. Sheean a question.
1:51PM We're making slow but steady progress.

6 Now that the scope of the request, at least
7 apparently, has been narrowed insofar as the HRSG technology
8 is concerned to this distinctive part of the machine, the
9 part that would have the steam separators and the Chevron
1:51PM purifiers, does that go any distance to quelling your
11 client's concerns about turning over the complete blueprint
12 of this HRSG?

13 MR. SHEEAN: Judge, I have an alternative
14 proposal. We'll produce the drum internal drawings for all
1:52PM HRSGs that Victory Energy has sold that utilize either a
16 vortex purifier or a Chevron steam separator.

17 MR. GISLESON: Certainly that's good, but then it
18 goes back to, you just have to trust us.

19 THE COURT: Well, what else were you going to get
1:52PM besides their blueprints? They just said they'd turn it
21 over to you.

22 MR. GISLESON: I'm sorry, maybe I misunderstood.
23 I thought he said that they'll turn over all drawings of
24 drum internals for HRSGs that have the vortex steam
1:52PM separator and Chevron purifier, but that's not necessarily

1:52PM all drawings of all the HRSGs as to the drum assemblies.

2 THE COURT: Maybe the confusion is mine, but I
3 thought that it was the vortex steam separators and the
4 Chevron purifiers which were components of -- which were

1:53PM your proprietary information.

6 MR. GISLESON: Correct.

7 THE COURT: But I thought you -- did you just tell
8 me that you have incorporated into some of your HRSGs vortex
9 steam separators and Chevron purifiers?

1:53PM MR. SHEEAN: No. We have incorporated none. And
11 that's why I said if we have to turn over all drawings --

12 THE COURT: I misunderstood then --

13 MR. SHEEAN: Let me finish --

14 THE COURT: No. Sorry, you don't tell me --

1:53PM MR. SHEEAN: I apologize.

16 THE COURT: -- who's finishing, I tell you who's
17 finishing here in this courtroom.

18 MR. SHEEAN: Yes, sir.

19 THE COURT: All right. Now, I think I

1:53PM misunderstand you. I thought -- did you misunderstand him
21 as well?

22 MR. GISLESON: My understanding was we weren't
23 going to get any drawings because he's going to say the
24 vortex steam separator and Chevron purifiers aren't in any
1:53PM of them.

1:53PM THE COURT: No. I don't think that's what Mr.
2 Sheean -- I don't think that's what he's saying at all. Say
3 it again.

4 MR. SHEEAN: Your Honor, to be clear, Victory
1:53PM Energy has never utilized a vortex steam separator or
6 Chevron purifier in any HRSG boiler, and therefore we'll
7 turn over those drawings because there are none. There
8 aren't any drawings, Judge.

9 This goes back to the whole -- you know, they want
1:54PM to see every single boiler that we sold because you may have
11 incorporated some piece of technology. We don't sell high
12 pressure HRSGs.

13 THE COURT: Listen carefully now, will you turn
14 over to them -- in other words, what you're saying is you
1:54PM can't turn over that which you don't have. Will you, in
16 fact, though turn over to them the blueprints that you do
17 have which show the internal drum assembly as it presently
18 exists?

19 MR. SHEEAN: On a representative basis or for
1:54PM every one we've -- every boiler we've ever sold?

21 THE COURT: Well, for your HRSG -- I don't know if
22 there's different HRSG boilers or not. Is there more than
23 one type?

24 MR. SHEEAN: Can we take a break?

1:54PM THE COURT: As a matter of fact, why don't you

1:54PM check. If we can solve this problem, we'll be a long way to
2 solving a lot of the problems. We'll take a short recess
3 and then you talk to your client and we'll come back and
4 continue this.

2:01PM (Recess taken from 1:54 p.m. to 2:02 p.m.)

6 THE COURT: Okay. Lets's pick up where we left
7 off on this issue of the HRSG boilers and the extent to
8 which, if at all, the Defendant would be willing to supply
9 the blueprint of the drum area of that boiler.

2:02PM MR. SHEEAN: Judge, we still feel like this is a
11 witch hunt and don't feel it's proper to force Victory to
12 produce drawings --

13 THE COURT: I haven't done that, and I'm not. I
14 simply was inquiring whether the fact that the blueprint
2:02PM requested has been reduced from apparently the whole machine
16 to a tiny portion of the machine, if that at all assuages
17 your concern that they're dipping into your proprietary
18 tent.

19 MR. SHEEAN: It does not assuage us. It reduces
2:02PM the volume of documents, but it's still going to require the
21 combing through of some 50-odd job files to find the
22 internal drawings that demonstrate that we never sold an
23 HRSG with Chevron purifier and vortex separator.

24 THE COURT: All right. Now, let's go back and
2:02PM finish up some of these other points and we may be closer to

2:03PM me putting an order on the record.

2 In response to Mr. Sheean's point that you only
3 jumped on board this license agreement by virtue of you
4 purchasing the assets on September 8, 2004, so anything that
2:03PM happened before that, at least, insofar as you're concerned,
6 your ox wasn't being gored so you can't get that
7 information; what about that?

8 MR. GISLESON: Not surprisingly, we disagree.
9 This case involves technology, there's also been an issue to
2:03PM improvements that were made during the license period. The
11 reason we need to go back and look at information while Erie
12 was the licensor is to examine exactly what they received
13 and exactly how they manufactured the boilers, including
14 what information they were using from what source in the
2:03PM development of those boilers.

16 Because even if we only look at the boilers that
17 were produced, designed, and manufactured after they
18 acquired it, they're now turning us off from seeing whether
19 they were relying on information they received prior to the
2:04PM acquisition to design and sell those boilers. It goes back
21 to the whole idea of, well, gee, it's public knowledge, it's
22 in the public domain, and that's where it came from, it
23 didn't come from anything we got from Erie; but they're
24 saying that at a time when we're not allowed to look at the
2:04PM documents that they have from their dealings with Erie, so

2:04PM we can rely on the fact, it's not a public domain item, it's
2 an Erie Power item that you got on this date, from this
3 individual, and this drawing.

4 And what's really especially frustrating from our
2:04PM perspective, and this is kind of a standing issue, is I
6 don't think there's any dispute that Indeck is the licensor
7 under the license agreement. As the licensor, we have all
8 the rights under the license agreement which includes the
9 right to get all this very same information back at the
2:05PM conclusion of the license agreement.

11 What's interesting is that Victory objected in the
12 Bankruptcy Court to Indeck's attempt to acquire this
13 technology from Erie. And Victory, through Mr. Sheean, said
14 "Under the license, the licensor, potentially Indeck, has
2:05PM the right to audit the records of Victory including pricing,
16 performance data, and other proprietary information relating
17 to any sale of products as defined in the license agreement
18 by Victory, such as an audit in order to reveal certain
19 proprietary information, trade secrets of Victory as a
2:05PM result of the motion," which is the motion for the assets to
21 be sold to CMI and then to Indeck.

22 If the motion is granted, Victory would be
23 required under the license to reveal Victory proprietary
24 information and trade secrets to a direct competitor. So
2:05PM this is Victory acknowledging that if Indeck becomes the

2:06PM licenser, it has the right to all this information. And
2 then before we had the status conference, it was decided
3 about joint discovery plan. And in the joint discovery
4 plan, the parties had to work together to identify the
2:06PM subjects of discovery. And the parties agreed at Paragraph
6 2 of the joint discovery plan, "Discovery will be needed on
7 a number of topics that include, but are not limited to the
8 following: Information and documents received by VEO from
9 Erie Power Technologies, Inc. (EPTI, the original licenser),
2:06PM EPTI, VEO, and Indeck's performance under the license
11 agreement; communications between VEO and EPTI during the
12 term of the license agreement; projects between EPTI and VEO
13 outside of the scope of the license agreement; VEO's
14 marketing and sale of boilers under the Keystone trademark
2:06PM and the license agreement, whether VEO engaged in conduct
16 exceeding the scope of the licensing agreement, including
17 incorporated technology received from EPTI and boilers
18 outside of the scope of the license agreement; damage
19 experienced by either of the parties."

2:07PM As part of that process, VEO asserted an
21 objection. That objection was any discovery involving the
22 negotiation and interpretation of the license agreement.
23 And I think during the conference, VEO decided, well, we'll
24 permit that discovery to occur. So that when the parties
2:07PM went over the joint discovery plan, there was no discussion

2:07PM about limiting discovery to only that period after Indeck
2 acquired the technology.

3 And then we served discovery on Victory and
4 Victory said in its response to our document requests, which
2:07PM understandably cover the period of time before Indeck

6 acquired the technology, "We will produce all of this
7 documentation to you once an appropriate protective order
8 has been entered." The protective order has now been
9 entered, it lists the individuals at Indeck, one of them is

2:08PM Mr. Poloski, to -- who can review highly confidential
11 information. The documentation will still be stamped
12 confidential. But there shouldn't be any highly
13 confidential information with respect to any documentation
14 they received from Erie Power because we're the successful
2:08PM licensor. So that up to this point Victory was saying,

16 we'll give you the documents, you have a right to the
17 documents under the license agreement, and then we get into
18 discovery and we're met with objections.

19 THE COURT: Finally, with respect to the
2:08PM documentation that would predate January of '03, in the face
21 of Mr. Sheean's representation that -- and I may misspeak on
22 this, correct me; in the face of his representation that
23 Victory would not take the position at trial that it already
24 knew how to do what they knew how to do independent of your
2:09PM information, doesn't that go a long way toward rendering

2:09PM that earlier documentation irrelevant if they are not
2 defending on the basis that they knew how to do it anyway?

3 MR. GISLESON: If the stipulation is they had no
4 prior knowledge or engineering capability concerning water
2:09PM tube boilers prior to the licensing agreement, then I would
6 accept that stipulation.

7 THE COURT: Is that too broad?

8 MR. SHEEAN: Just a bit, Judge.

9 THE COURT: Well, it's not water tube boilers, in
2:09PM general, it's really -- there's water tube boilers and
11 there's water tube boilers, I'm talking about Keystone
12 technology, that's really the question: Did you know -- if
13 you change your stipulation and insert Keystone technology,
14 doesn't that get the job done for you as well?

2:10PM MR. GISLESON: Yes. Although, we would like to
16 get the documentation from the two Erie water tube boilers
17 that they sold prior to the license agreement.

18 THE COURT: I understand your points. Mr. Sheean,
19 is there anything you want to say, briefly, in response to
2:10PM what you've heard?

21 MR. SHEEAN: Yes, Your Honor. Just to a couple of
22 the key points. First, I want to apologize for getting a
23 little heated earlier.

24 THE COURT: No apologies necessary. I already
2:10PM dressed you down once, I won't do it again.

2:10PM MR. SHEEAN: Victory has been a client of mine for
2 a number of years and they take this situation seriously,
3 and as a result, I do as well.

4 THE COURT: I used to be over on that side so I
2:10PM know what it feels like.

6 MR. SHEEAN: Just a couple of brief points, Judge,
7 and I'll go backwards to frontwards because that's the way I
8 took my notes.

9 Mr. Gisleson listed a number of instances wherein
2:10PM we said, yeah, fine, we'll produce documents that were dated
11 before September 8, 2004, but one of the first things that
12 came up in our scheduling conference, Your Honor asked me,
13 now, are you really going to push this standing issue. And
14 I said, I don't know, Judge, I still haven't seen the asset
2:11PM purchase agreement. Finally, a couple of weeks thereafter,
16 we did get the purchase agreement and there it is, Indeck
17 Keystone Energy did not get the technology for the HRSGs
18 from Erie Power, or CMI, and Indeck Keystone Energy's assets
19 were limited to accounts receivable after September 8, 2004.

2:11PM So I think it's a bit of a red herring to wave in
21 your face all the many times when Victory Energy was going
22 to disgorge documents when we didn't know what we were up
23 against at that point. So I think that's a bit disingenuous
24 to say that we're coming into this lately is something other
2:11PM than an appropriate response.

2:11PM With respect to -- we spent a little bit of time
2 talking about the license agreement, itself, and what it is
3 that was licensed and what wasn't. And I think if you take
4 a look at the license agreement, which is attached to the
2:12PM motion, it's also attached to, I think, to the pleadings
6 that were filed in this case, the definition of products is
7 clear, it's industrial water tube boilers with a capacity
8 steam range of 29,000 pounds per hour to 150,000 pounds per
9 hour.

2:12PM THE COURT: Right.

11 MR. SHEEAN: Period. Product shall include, but
12 not be limited to, those items identified that are listed.
13 So I think that's got to be given some weight, not just with
14 respect to the resolution of the merits of this case but --

2:12PM THE COURT: Not to interrupt, but what you're
16 really saying is going right back to the contract, itself,
17 that your interpretation of it is that -- contrary to their
18 interpretation, is that you were not necessarily limited to
19 the type of boiler that they claimed you were limited to; is
2:13PM that right?

21 MR. SHEEAN: We were permitted to sell industrial
22 water tube boilers utilizing the Keystone name and utilizing
23 the software provided by Erie Power to sell any industrial
24 waterer tube boiler -- natural circulation water tube boiler
2:13PM within that capacity range. And if Victory Energy chose to

2:13PM include membrane wall technology versus tangent tube
2 technology, if they chose to use water cool technology
3 versus the refractory that was the so-called old style, that
4 was their right under the license agreement.

2:13PM And I think that examining that licensing
6 agreement goes a long way to demonstrate Victory Energy's
7 position here and what we consider to be vastly overbroad
8 requests for documents.

9 THE COURT: All right.

2:14PM MR. GISLESON: Your Honor, just one clarification
11 on the record, Indeck did acquire HRSG technology, so it's a
12 misreading of the asset purchase agreement to say that
13 Indeck did not acquire any HRSG technology.

14 What the agreement talks about is CMI, EPTI
2:14PM retained reheat recovery steam generator technology applied
16 to combustion turbine exhaust gas heat recovery applications
17 of 18 megawatts and above. Below 18 megawatts and above,
18 Indeck did acquire the technology. So there was some HRSG
19 technology acquired along with the Keystone assets. And, in
2:14PM fact, if you look at the schedule it shows there's joint
21 ownership of technology to the extent it applied both to
22 HRSGs as well as to the Keystone assets. So I just wanted
23 to make that one clarification to say that there was HRSG
24 technology acquired.

2:15PM THE COURT: Okay.

2:15PM MR. SHEEAN: Just to respond to that briefly,
2 Judge, we never got the schedules, number one, and number
3 two, the agreement, itself, says that one of the excluded
4 assets is any assets related to the HRSG business.

2:15PM MR. GISLESON: Which is a defined term on the
6 first page of the asset purchase agreement, and it's
7 defined, "Limited to the exhaust gas recovery applications
8 of 18 megawatts and above."

9 THE COURT: Have you ever heard the expression,
2:15PM "Losing the forest through the trees?" We're there right
11 now.

12 This is what -- I'm going to enter an order and
13 really the order is going to be structured around the three
14 major objections; one is the alleged irrelevance of the
2:15PM January -- anything prior to January of '03, the alleged
16 irrelevance of anything prior to September 8, 2004, and the
17 objection for the reasons that Victory put on the record to
18 being required to divulge information about your HRSG.

19 This is an order:

2:16PM

21 O R D E R

22

23 Presently pending before the Court is a motion for
24 protective order limiting discovery as well as Plaintiff's
2:16PM motion to compel production of documents in opposition of

2:16PM Defendant's motion for protective order. With the
2 understanding in the interest of brevity, I'm simply
3 incorporating here in my reference the substance of the
4 argument that you previously had here today where each party
2:16PM had an opportunity to articulate more fully their respective
6 positions.

7 Essentially, Victory objects to the request of
8 discovery in the nature of subpoenas on three bases: One,
9 that any information -- that any information from Victory
2:17PM that would predate January 7, '03, which would be the date
11 of the licensing agreement, is irrelevant. Second, that any
12 information that would predate September 8, 2004 would also
13 be irrelevant in that, in Victory's view, Indeck does not
14 have standing to complain about matters that occurred prior
2:17PM to the time that it purchased the assets. And three, that
16 Indeck's attempts to acquire allegedly proprietary
17 information concerning Victory's HRSG product is irrelevant
18 given the nature of the claims.

19 First, with respect to any request for
2:18PM documentation prior to January 7, 2003, I find based on the
21 representations made here today as to the nature of the
22 defense or defenses that would be asserted by Victory that
23 pre-January '03 information is irrelevant and not calculated
24 to lead to the discovery of -- and would not be calculated
2:18PM to lead to the discovery of admissible evidence within the

2:19PM meaning of Rule 26.

2 With respect to the request for documentation that
3 predates -- let me phrase it this way: With respect to the
4 request for documentation that predates September 8, 2004, I
2:19PM find that the requested information does involve claims --
6 potentially involve claims for defenses in the case and in
7 my view would be calculated to lead to discovery of
8 admissible evidence.

9 On the subject of the HRSG boiler, as I understand
2:19PM it, at least at the present time, the Plaintiff has no hard
11 information in its possession to suggest that Keystone
12 technology has, in fact, been injected, if you will, into
13 the HRSG product, unlike, for instance, contrary to the
14 situation where they claim it does have hard information
2:20PM that the Keystone boilers were allegedly inappropriately
16 modified by Victory.

17 Given the fact that the most that can be said at
18 the present time is that Indeck has a "concern" that that
19 technology might or could be introduced into the HRSG
2:20PM boiler, and also in view of the fact that I have a sworn
21 affidavit before me that it has not been incorporated, and
22 balancing the equities, considering proprietary nature, and
23 with an eye toward good cause, I do not see at this time in
24 the litigation that notwithstanding the protective order
2:21PM that that type of discovery is appropriate.